No. 15172

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

W. B. JONES LUMBER COMPANY, INC., AND LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2288, AFL, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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This reply brief will deal with certain inaccuracies in the Union's brief and with several contentions which are there raised for the first time.

1. The Union's principal contention is that the evidence adduced to show the interstate sales of several of the customers of Jones Lumber Company should be disregarded, and that the aggregate of the sales made by Jones Lumber to its remaining customers is below the $200,000 figure required by the Board's jurisdictional standards, discussed in our main brief at page 7. The Union's position appears to be that in seeking to

establish the amount of the interstate sales of eight such customers, the General Counsel failed to adhere to the rule that where summaries, tabulations, charts or schedules of financial records are sought to be introduced as evidence of the data contained therein, the original records must be made available for inspection and use in cross-examination. This contention is without merit since the Board's findings (R. 17) [1] respecting the interstate sales of the eight customers were based, not on naked hearsay memoranda, but upon sworn testimony of witnesses available for cross-examination, and the Union had access to the books and records supporting the documents used by such witnesses while testifying.

Thus William Merrill, secretary-treasurer of Sprague Engineering Co., testified that he had "knowledge" that his company's sales for the fiscal year ending September 30, 1954, were approximately $5,600,000, that 70% thereof involved sales to customers in "[p]ractically every state in the United States" (R. 103-105).[2] George C. Fee, administrative assistant to the general manager of Johnson Pump Co., testified, on the basis of his personal review of invoices which he had brought to the

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[1] Reference to portions of the printed record are designated "R." Occasional references to the typewritten stenographic transcript of testimony, certified as part of the record herein, are designated "Tr.".

[2] Merrill stated that because they were his only copies, he preferred not to surrender custody of company records which he had brought with him to substantiate G.C. Exhibit 3 (R. 217), showing his company's *purchases* from Jones Lumber Co. (see our main brief, pp. 15-16, R. 108-109). He added, however, that both the purchase and sales records would be available for examination by the Union at his company's offices in Gardena, California, thirteen miles away from Los Angeles, where the hearing was being held (*ibid.*).

hearing, that his company's interstate sales exceeded $50,000 (R. 171-175).[3] Robert H. Lancaster, Office Manager of Wolf Range Manufacturing Company, using duplicate California sales tax returns prepared by an employee under his supervision (R. 184-185),[4] testified that his company's out-of-state sales amounted to $55,729.61 for a single three-month period in 1954 (R. 186-187). Roy Frederickson, chief accountant for Hammond Manufacturing Co., using California sales tax returns which he had personally prepared,[5] testified that for the fourth quarter of 1954, his company's sales to out-of-state customers (exclusive of the United States Government) amounted to $444,325.45 (R. 192-193). Richard Smith, office manager of Mississippi Glass Co., using a summary which he had personally prepared

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[3] Contrary to the Union's contention (Brief, pp. 9, 18), Fee did not decline to "leave the invoices and binders for inspection of respondent" and did not refuse "to permit the records to be inspected or used for cross-examination." The record shows that in response to an inquiry by the Trial Examiner, Fee stated that he could see no reason why there would be any objection to leaving some of the records at the hearing for two or three days, but preferred to obtain company permission to do so (R. 171). The hearing was then recessed to permit examination of the records by Union counsel, who thereafter used them in his cross-examination (R. 173-175, Tr. 252). Finally, the evidence shows that with the Union's consent, the Trial Examiner ruled that the records would remain in the custody of counsel for the General Counsel from May 25 to May 27, 1955, subject to examination by the Union (see our main brief to this Court, pp. 17-18).

[4] These returns were submitted for examination to Union counsel (R. 179), who used them during his cross-examination of Lancaster (Tr. 274). The latter stated that he "could produce the files containing the invoice copies" of this company's 1954 out-of-state sales, but was not requested to do so (*ibid.*).

[5] Counsel for the Union examined such returns (R. 192), and stated on the record that he was "not going to object to the document" (R. 193).

from data in his company's files,[6] testified that the company's 1954 sales to out-of-state customers totaled $324,-015.68 (R. 195-196).[7] Capitola Fierke, office manager of Southern Heater Corp., testifying from a summary of sales invoices prepared at her request by an employee under her supervision,[8] stated that Southern's 1954 sales to out-of-state customers amounted to $1,799,875.00 (R. 205-206). Harry McCully, president of C & M Manufacturing Co., on the basis of his "own knowledge" and "apart" from company records, testified that approximately 50% of his company's 1954 sales, totaling $1,-300,000.00, involved out-of-state customers (R. 208-209, Tr. 317).[9] Robert Morse, treasurer of Morris D. Kirk

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[6] This summary was admitted into evidence for a limited purpose (see our main brief, pp. 9-10). Smith stated that if counsel so desired, they would be permitted to examine the original invoices from which the summary was prepared (R. 196). Smith's office is in Fullerton, California, 26 miles from Los Angeles (R. 194).

[7] In an affidavit submitted to the Trial Examiner, Smith stated that although he had "no present recollection of the exact amount to which I testified," he had "checked the office copy of the summary to which I referred in my testimony and I find thereon that the figure to which I testified is $324,015.68," which "is the correct amount" (R. 8-9). The Union's claim (Brief, pp. 23-24) that it had no access to the affidavit is without foundation. After the Intermediate Report gave the Union notice of the existence of the affidavit, (R. 13-15 n. 1), the Union was in a position to request a copy of the original affidavit, which was in the official files of the Board and open to inspection. The Union made no attempt to inform itself of the contents of the affidavit, to file a rebuttal affidavit, or to ask for a reopening of the hearing in order to cross-examine Smith.

[8] The summary was exhibited to Union counsel for examination, and Fierke stated that there would be no objection if any party to the proceeding went to her office to examine the invoices (R. 204-205). Fierke's office is in Compton, California, 12 miles from Los Angeles (R. 200).

[9] The Union's objection to McCully's testimony is barred by Section 10(e) of the Act. This objection was not made in the Union's brief in support of exceptions, and its exceptions contained only

& Sons, stated that his company ships goods to "the eleven western states and Alaska and Hawaii, and the Philippine Islands"; and testifying from a few invoices of out-of-state shipments which he had selected and from an adding machine tape,[10] stated that the aggregate of the invoices amounted to $52,719.72 (R. 213-214).

The foregoing witnesses were cross-examined at length by the Union. Moreover, as shown in our main brief (p. 8), although the Trial Examiner advised the Union that he would strike their testimony if the "union has any difficulty in verifying any of the information from the records" of the witnesses (R. 215), the Union has neither claimed nor shown that it was denied access to such records or that any of the witnesses' testimony was inaccurate. We accordingly submit that the evidence objected to was no less substantial than that which this Court accepted in *N.L.R.B.* v. *J. R. Cantrall Co.*, 201 F. 2d 853, 855, certiorari denied 345 U.S. 996.[11]

2. The record shows that William G. Braley, credit manager of Jones Lumber Co., gave uncontradicted testimony establishing that the sales made by his company to customers with interstate sales above $50,000 exceeded $200,000 in 1954 (see our main brief, p. 2). Con-

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"a general objection which did not apprise the Board that [the Union] intended to press the question now presented." *Marshall Field & Co.* v. *N.L.R.B.*, 318 U.S. 253, 255; *N.L.R.B.* v. *Pinkerton's National Detective Agency*, 202 F. 2d 230, 233 (C.A. 9).

[10] These documents were examined by Union counsel, who stipulated that the tape contained a correct total of the figures thereon (R. 214-215).

[11] Since the aggregate sales made by Jones Lumber to customers with interstate sales above $50,000 exceeded by $10,912.57 the $200,000 figure provided in the Board's jurisdictional requirements, the sales to some of these customers may be disregarded without impairing the propriety of the Board's findings.

trary to the Union's assertion (Br. p. 17, n. 6), the fact that such customers did not give evidence corroborating the sales to them does not convert such competent testimony into hearsay. Moreover, this contention was not raised before the Board and hence is not properly before this Court. Section 10(e) and cases cited at pp. 4-5, n. 9, *supra*.

3. For the first time in this litigation, the Union (Br. 25) attacks the validity of the complaint on the ground that it was not signed by the regional director, as required by the Board's rules. Under Section 10(e) of the Act, this contention is not properly before the Court. Moreover, the Union has submitted no evidence to show that the signature on the face of the complaint was not that of the acting regional director. In addition, the Board's rules provide only that the director shall "issue" a complaint. NLRB Rules and Regulations, Series 6, Sec. 102.15. The Union has not shown that someone other than the acting director issued the complaint. In the absence of such a showing, "we must assume that the law has been complied with." *N.L.R.B.* v. *Wiltse,* 188 F. 2d 917, 920 (C.A. 6), certiorari denied, 342 U.S. 859; See also *Olin Industries* v. *N.L.R.B.,* 192 F. 2d 799 (C.A. 5), certiorari denied, 343 U.S. 919, and the cases there cited.

4. Finally, there is no merit to the Union's contention (Br., p. 27) that the Board based its unfair labor practice finding (i.e., that the Union unlawfully caused Jones Lumber Company to discharge Employee Tooze because he was not a member of the Union) upon evidence admitted into the record solely against Jones Lumber Company. The critical fact establishing the unfair labor practice is that, according to the undisputed testimony of Hardy, the yard superintendent for

Jones Lumber, Assistant Business Agent Matko told him that Tooze was not a member of the Union and could not continue working (R. 111-112). Such competent testimony was properly admitted by the Trial Examiner (R. 112), and constitutes substantial evidence supporting the Board's finding (see our main brief, pp. 12-13).

CONCLUSION

For the reasons stated herein and in our main brief, it is respectfully submitted that a decree should be issued enforcing the Board's order in full.

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